Supreme Court, U.S.
FILED

No. 011539 APR 16 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

—v.—

THE CITY OF NEW YORK, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PETER SUDARSKY
Petitioner Pro Se
135 Central Park West
New York, New York 10023
(212) 595-7172

INTRODUCTORY STATEMENT

Petitioner-plaintiff owned an assembly of properties on Manhattan's eastside which he had merged into a single zoning lot. He planned to build an apartment house. Defendant City of New York then issued an Order which barred plaintiff from obtaining a construction permit he required to make any use of his vacant property. Plaintiff did not accept an offer by The City to split the property into segments to regain some use of it by rehabilitating existing buildings. Instead, he sold the property before obtaining from The City a final determination of its permitted use.

QUESTIONS PRESENTED

Whether a takings claim forever remains unripe when a landowner sells the property interest before obtaining a final and authoritative determination of land use.

Whether an owner is required to split a property into segments to ripen a regulatory takings claim.

Whether access to the federal courts is forever barred on *res judicata* or on ripeness grounds after denial of justice in the state court where the merits of a regulatory takings claim have not been litigated.

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PETITION FOR WRIT OF CERTIORARI

Peter Sudarsky respectfully petitions for a writ of *certiorari* to review the judgment of The United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of The United States Court of Appeals for the Second Circuit, unpublished, appears as Appendix A to the petition (dated Nov. 14, 2001, index no. 00-9470).

The decision of the United States District Court Southern District of New York appears as Appendix B (dated Oct. 20, 2000) (99 Civ. 10921).

The March 12, 2002, DENIAL of a Petition for Rehearing by The United States Court of Appeals for the Second Circuit appears as Appendix C. (index no. 00 9470).

A decision of the New York Supreme Court Appellate Division First Department (220A.D. 2d 353, 9/31/95) appears as Appendix D.

A second decision of the New York Supreme Court Appellate Division First Department (cite as 247 A.D.2d 206, 668 N.Y.S. 2d 350) (entered Feb. 3, 1998) appears as Appendix E.

Decisions of the New York Supreme Court (trial court) dated March 22, 1994, and February 19, 1997, which were the subject of the appeals to the Appellate Division in App. D and App. E appear here as App. F.

JURISDICTION

The unpublished judgment of the United States Court of Appeals was entered November 14, 2001 (Appendix A to this petition). Petition for Rehearing was denied March 12, 2002 (Appendix C). This Court has jurisdiction under 28 U.S.C. para 1257(a) and Sect. 1983 Statutes.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Defendant City of New York barred issuance of a permit required by Plaintiff to make any use of his vacant midtown property in Manhattan for an unreasonable period of time while costs of ownership continued to accrue. Plaintiff's regulatory takings claim has been subjected to a series of judicial evasions of responsibility which resulted in summary judgments in favor of the municipal defendants granted without trial or judicial examination of the issues. Whether the regulation imposed by The City did take all use of the property and did so with legitimate public purpose are issues which have not ever been adjudicated in 12 years of motion practice.

Now, once again, as a result of the Panel Summary Order of Nov. 14, 2001, by The United States Court of Appeals for The Second Circuit (App. A), Plaintiff's takings claims for the inverse condemnation of property in which he invested the earnings of an adult lifetime have been dismissed without trial. The Court below affirmed a grant of summary judgment by The Federal District Court on *res judicata* grounds although trial of the merits has not ever been held. The Second Circuit based its decision on its finding that because Petitioner did not obtain "a final and authoritative determination" of what use could be made of the property, he cannot now bring a regulatory takings claim for either the permanent loss of value or for the costs which accrued while defendants were taking all use, nor can he ever do so because he sold the property without obtaining that determination.

The unpublished decision of United States Court of Appeals for the Second Circuit of New York (App. A) bars landowners caught in a web of dilatory land-use regulation from pursuing regulatory takings claims if they choose to sell instead of submitting to continued rounds of futile applications.

The futility of actions available to Plaintiff to obtain that final determination was not acknowledged in the unpublished decision of The Second Circuit. Nor did that Court acknowledge or rule upon Plaintiff's temporary takings claim for costs in excess of $3,000,000 which accrued while all use was taken.

After 12 years, plaintiff continues to seek an ever more elusive trial of the merits.

A. Factual Background

Plaintiff, an ex journalist turned real estate developer, owned eight contiguous brownstones in midtown Manhattan in 1985 on E. 52nd and E. 53rd Streets between

Third and Second avenues. The parcel consisted of nine 20' by 100' zoning lots which had been consolidated into a single lot. This was the only assembled site ready for construction in midtown at the time and attracted the attention of neighbors and preservationists. I was stopped cold by actions of the defendant City of New York from making any use of my vacant property.

The City and The Metropolitan Transit Authority imposed a ban in 1987 against issuance of any permit on the property. Defendants issued their permit ban to facilitate obtaining an easement under the E. 53rd Street portion of the property to provide for construction of a tunnel connecting subway stations on Second and Third avenues in the event that the Second Avenue Subway Line is built in the future.

Defendants then waived access for the tunnel into both subway stations the tunnel was intended to connect, raising a question of fact as to whether the permit ban would have met the "rough proportionality" requirement in This Court's *Dolan* ruling. The City had not designed a tunnel and had failed to determine the dimensions of an easement which it was willing to accept.

Plaintiff, therefore, was unable to give the City the easement for a period of two years in which The City continued its Order in effect barring submission or consideration of any permit application. As a result, Plaintiff was unable to obtain a "final determination" of the permitted use of the property.

Plaintiff had relocated all the tenants, severed utilities from the street which could not be reconnected without permits barred by defendants, obtained demolition permits, secured financing and applied for a construction permit by the time Defendants issued their order barring a permit. I could not rent or use the property, build on it,

or sell it. My brokers were unable to obtain a single offer to buy the property or any part of it while the permit ban remained in effect. Taxes accrued at $28,000 per month and interest payments at $150,000 per month. Ownership costs while all use was denied exceeded $3,000,000. The addition of these ownership costs to the purchase price made its economic development unviable.

Defendants continued in effect their Order banning issuance of any permit required to make use of the vacant property for a year after legislating a rezoning of what came to be called "The Sudarsky Property." Plaintiff could not build even the smaller building contemplated by the downzoning or make any use of the property for almost two years while its value remained at zero. Brokers were unable to obtain a single offer to purchase any part of it while the permit ban continued. Services could not be reconnected without permits. The downzoning legislated by The City of New York, in itself, also took all viable economic use of the property, reducing available FAR by 55 percent. Plaintiff's property was the only site in the downzoned area ready for development. The futility of a BSA proceeding is undisputed.

For the period of time Plaintiff owned the entire property, there was no use which could be made of it. Its value had been reduced to zero.

Defendant City of New York offered plaintiff only one alternative for obtaining a final determination of use of the property. If plaintiff split the property into segments, The City would permit owners of each segment to obtain permits.

Subdivision would not restore viable economic use but it could restore some value to the property and allow it to be sold. After years of trying to provide an easement

and to negotiate a permitted use for the property, I accepted the City's offer to subdivide the zoning lot and sold the parts.

I was able to sell only after splitting the properties as demanded by defendants, who then withdrew their permit ban and easement demand by assuring interested buyers that barriers to issuance of a permit would not be enforced upon subdivision of the properties and sale of the parts.

I sold the property in pieces for approximately $11,450,000, about $1,000,000 less than I paid for it three years earlier. By that time I had invested an additional $10,000,000 for tenant relocation and expenses of ownership.

Whether an owner is required to split a single property into parts in a manner which may destroy its value as a whole but which restores some value above zero to the parts is an issue.

B. Judicial Proceedings

Unwisely in retrospect, I commenced suit in federal court. In *Peter Sudarsky et al v. City et al v. City of New York*, (RJW) 779 F.Supp. 287-293 (1991), the Hon. Robert J. Ward dismissed plaintiff's due process and equal protection claims, but as he "made clear," he did not rule on the merits of my regulatory takings claim. He found that claim was unripe because I had not exhausted state court remedies.

For years defendants have continued to confuse and complicate the issues by representing that my takings claims were decided by Judge Ward in 1991 although The Court's decision at that time held, specifically, that the issue of "too far" essential to a finding on the merits had not been adjudicated. The 1991 decision did not

decide the merits and made no reference to the futility of submitting additional, more modest proposals after the Order of Defendants barred issuance of any permit on my property.

I have not included the District Court's 1991 decision in the Appendix because it does not bear on those significant issues of ripeness and preclusion which are the subject of This Petition.

Subsequent appeals of the 1991 Decision of The District Court and motions based on new evidence were rejected by The District Court and The Second Circuit. A Petition for Certiorari was summarily rejected by This Court.

I brought my takings claim to State Court, which ultimately dismissed without trial of the merits on grounds that I had failed to meet the procedural requirement for Notice of Claim in New York's Municipal Law. Four contradictory state court decisions are listed below:

1) The Supreme Court (trial court) in New York summarily dismissed my regulatory takings claim without trial on res judicata grounds (index 29446-92 decided 3/22/94) holding I had picked my forum and lost. (App. F).

2) The New York State Appellate Division First Department reversed and remanded, holding that the prior federal court rulings were "not final" on the merits and not grounds for a *res judicata* finding (220A.D. 2d 353, 9/31/95) (App. D herein). This finding precludes a dismissal on *res judicata* grounds.

3) The New York Supreme Court (trial court) once more without trial then dismissed on an erroneous finding of lack of timeliness (29446-92 dated 2/19/97). (App. F).

4) The Appellate Division in its second decision in This Case found the dismissal on timeliness grounds was in error but then dismissed on grounds of Plaintiff's failure to comply with the notice requirements of New York's Municipal Law Sect. 50-e. (cite as 247 A.D.2d 206, 668 N.Y.S. 2d 350) (Feb. 3, 1998) (App. E). The dismissal on notice-of-claim grounds was based in part on the A.D's unlitigated assumption in its dictum that my case "lacks substantive merit."

The New York Court of Appeals in summary decisions refused to review the Notice of Claim bar to my takings claim.

The application of a Notice of Claim requirement to dismiss a Fifth Amendment takings claim, reached in part on the basis of an unlitigated assumption on the merits, validates This Court's decision in *Felder v. Casey* 487 U.S.131 (1988), holding that constitutional claims are too important to be disposed of on whimsical grounds where discretion might dictate a finding.

THE RETURN TO FEDERAL COURT

Plaintiff brought anew his takings claim in Federal Court where a requirement for Notice of Claim may not bar suit. Plaintiff believed the case now to be ripe. Plaintiff's Summons and Complaint to the Federal District Court for the Southern District of New York was dated Oct. 29, 1999.

No trial on the merits had ever been held. Yet The District Court granted Appellee' 12(b)(1) and 12(b)(6) motions to dismiss on *res judicata* grounds in its decision dated Oct. 20, 2000 (99Civ. 10921) App.B.

The United States Court of Appeals for The Second Circuit then affirmed the District Court's *res judicata*

finding in an unpublished decision dated Nov. 14, 2001, index no. 00-9470 App. A.

Although the Second Circuit decision makes reference to an assumption by the New York Appellate Division's second panel of "Lack of substantive merit" (pg. 3) as applied to a requirement for notice, the plain language of The Circuit's decision states that The Court acted on those ripeness findings which are the subject of This Petition.

The Second Circuit held that Plaintiff's case was not ripe and forever remains unripe because plaintiff sold the property before obtaining a "determination of the property's permitted uses."

The decision by Justices Rosemary S. Pooler and Robert A. Katzmann, Circuit Judges, and The Honorable David N. Hurd, District Judge sitting by designation, reads in part:

> "Plaintiff never requested a variance from the new zoning requirements or submitted a proposal other than his original 17-story building. In other words, plaintiff never will be able to show that the city's downzoning went too far in prohibiting development of his property. His claim never will be 'ripe' " (pg 3).

REASONS FOR GRANTING THE WRIT

Reason 1) The concept that a takings claim forever remains unripe when a landowner sells a property before obtaining a final and authoritative determination of land use is inappropriate and contrary to the spirit of the Supreme Court's ripeness jurisprudence for regulatory takings. The decision would allow a municipality to take an end run around jurisprudence of This Court, which

holds that a plaintiff is not required to undertake futile actions to ripen a claim. This Court observed that

> "Government authorities . . . may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision" *Palazzolo v. Rhode Island*, 121 S.Ct. 2448-59 (2001)

November 23, 2001, Plaintiff's Attorney at that time, Professor David J. Bederman, Esq., submitted a Petition for Rehearing. That Petition was rejected summarily in one word decision ("Denied") three months two weeks later on March 12, 2002, the date which starts the clock App. A. (Professor Bederman, who has other cases before This Court and a teaching schedule too, has withdrawn as my attorney. He had been acting *pro bono* and is unavailable to submit This Petition.)

Professor Bederman's Petition for Rehearing to The Court below states in part that

> The real import of this (2nd Circuit) panel's decision seems to be that Sudarsky cannot assert that the City's delay in responding" to his efforts to obtain a final determination constituted a rejection of them, and therefore that he had received a "final and authoritative determination" within the meaning of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). In short, the panel appeared to hold that a land-owner's sale of the property would forever preclude ripeness. This would mean that landowners caught in a web of dilatory land-use regulation and procedures would be barred from pursuing regulatory takings claims if they chose to sell instead of submitting to continued rounds of futile applications.

Reason 2) It remains appropriate for This Court to address the significant ripeness findings upon which The

United States Court of Appeals for the Second Circuit dismissed This Case.

Although Appellees will continue to assert my claims were decided by the 1991 ruling of the Federal District Court in *Sudarsky v. City of New York*, (RJW) 779 F.Supp. 287-293, the doctrine of *res judicata*, itself, bars reference to that decision as a basis for a *res judicata* finding. The New York State Appellate Division First Department held that the findings in the 1991 decision of The Federal District Court were "not final" and do not provide reason for dismissal on *res judicata* grounds (App. D).

Because The Appellate Division ruling precludes a *res judicata* finding based on the 1991 decision of the District Court, I do not include that decision in the Appendix to this Petition. My regulatory takings claim is the only claim now before the federal court. The merits have not been litigated.

The federal courts are not a super board of zoning appeals and have not assumed the authority to reverse the unequivocal ruling of a State Court.

Reason 3) Whether an owner is required to split a property to ripen a takings claim and under what circumstances is a question about which differences are developing in the circuits.

Reason 4) The Court below rejected plaintiff's temporary takings claim for costs incurred while defendants barred all use of the property. That decision is inconsistent with the jurisprudence of This Court and other circuits. To resolve the difference, This Court may decide that an action to recover losses resulting from a temporary regulatory taking is not barred if a plaintiff sells before a final determination of a property's per-

mitted use where efforts to obtain that determination have been made futile by municipal regulation.

Reason 5) Slow financial strangulation of a property's economic viability, however subtle, should not substitute for inverse condemnation as a means of avoiding just compensation as This Court has held.

Reason 6) The right to trial of a takings claim needs affirmation to put teeth into This Court's *Dolan* admonition that property rights receive equal respect as other Constitutional rights. Trial of the merits has not ever been allowed in this case.

Reason 7) "Lack of substantive merit" applied to a requirement for Notice of Claim need not preclude This Court from resolving important questions of ripeness and preclusion raised by This Petition if This Court determines those issues merit its attention.

"Lack of substantive merit," has become a term of art in the judicial system to insulate a court from judicial review. It should not be allowed to do so where the finding is imposed from the bench without argument and without trial of the issues.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

PETER SUDARSKY
Petitioner Pro Se
135 Central Park West
New York, New York 10023
(212) 595-7172

Dated: April 11, 2002

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

00-9470
Filed November 14, 2001

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of November two thousand and one.

Present: ROSEMARY S. POOLER,
ROBERT A. KATZMANN,
Circuit Judges,
DAVID N. HURD,
District Judge.*

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* The Honorable David N. Hurd of the United States District Court for the Northern District of New York, sitting by designation.

PETER SUDARSKY and NOMINEE TRADING CORPORATION, d/b/a 225-227 East 52nd Street Associates,

Plaintiffs,

PETER SUDARSKY,

Plaintiff-Appellant,

—v.—

THE CITY OF NEW YORK, THE NEW YORK PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSPORTATION AUTHORITY, and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants-Appellees.

Appearing for Plaintiff-Appellant:

Peter Sudarsky, *pro se*, New York, NY
David J. Bederman, Esq., Atlanta, GA

Appearing for Defendants-Appellees:

Sharyn Rootenberg, Assistant Corporation Counsel (Michael D. Hess, Corporation Counsel, Larry A. Sonnenshein, Louise Moed, Assistant Corporation Counsels, on the brief), New York, NY *for municipal defendants-appellees*.

Ira J. Lipton (Mary Jennings Mahon, Deputy Executive Director and General Counsel, Metropolitan Transportation Authority), New York, NY *for transit defendants-appellees*.

Appeal from judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) dismissing plaintiff's complaint.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Peter Sudarsky appeals from the October 26, 2000, judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) dismissing his complaint principally on grounds of *res judicata*. Sudarsky filed his complaint on October 29, 1999, raising many of the allegations he prosecuted in a federal lawsuit filed in 1989 and a state court lawsuit filed in 1993. All of the litigation stems from Sudarsky's attempt to develop eight lots on East 52nd and East 53rd streets in Manhattan into a single 17-story apartment building. During the planning process, city officials informed Sudarsky that they required a transit easement on his property for an underground pedestrian tunnel for subway passengers. While Sudarsky negotiated the easement, the city's Board of Estimate in October 1987 "downzoned" the area including Sudarsky's property to prohibit construction of buildings taller than eight stories. Sudarsky did not seek a variance or submit another building proposal to the city but instead sold his properties in 1988. Although defendants claim that Sudarsky approximately recovered his purchase price of $12 million, Sudarsky claims to have lost $10 million in development costs.

The key points of Sudarsky's litigation are as follows. Plaintiff filed a lawsuit in federal court, which the district court dismissed in 1991. *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991). In its 1991 decision, the district court dismissed on the merits

Sudarsky's causes of action under substantive due process, procedural due process and equal protection theories. With respect to plaintiff's allegations that defendants' actions were an unconstitutional taking, the district court first held on the merits that requiring a transit easement was not an impermissible condition on a building permit. *Id.* at 299. The district court also held that plaintiff's regulatory takings claim was not ripe because (1) he failed to obtain a final and authoritative determination from the city regarding what development it would permit on Sudarsky's property; and (2) he failed to use the state court system to seek just compensation for his property. *Id.* at 300-01. Sudarsky then filed a lawsuit in state court pressing, among other things, his regulatory takings claim. The New York courts ultimately dismissed the lawsuit in 1997 because plaintiff failed to file a notice of claim with the city. *Sudarsky v. City of New York*, 668 N.Y.S.2d 350 (1st Dep't 1998). Importantly, the state court refused to give Sudarsky permission to file a late notice of claim because he failed to adequately explain his delay and his lawsuit was "without substantive merit." *Id.* at 351. Sudarsky then brought the present lawsuit in federal court.

On appeal, Sudarsky claims that his second federal complaint is justiciable because neither the federal court nor state court dismissed his regulatory takings claim on the merits. In order to state a claim for regulatory takings, plaintiff must show first that the regulation has taken his property by going "too far" and second that any proffered compensation is not just. *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Plaintiff under no set of facts can satisfy the first element of his claim. While the 1991 district court decision used the term "unripe" to describe its dismissal of Sudarsky's claim for his failure to obtain a determination

of the property's permitted uses, it now is undisputed that plaintiff never will be able to do so because he sold the property before obtaining the required determination. Plaintiff never requested a variance from the new zoning requirements or submitted a proposal other than his original 17-story apartment building. In other words, plaintiff never will be able to show that the city's downzoning went too far in prohibiting development of his property. His claim never will be "ripe." Contrary to plaintiff's suggestion, this holding is consistent with Supreme Court precedent. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-39 (1997). Unlike the case before us, the land use regulation in *Suitum* was much more restrictive, permitting no development at all on plaintiff's land, which gave rise to the finality necessary for ripeness. Dismissal under Fed. R. Civ. P. 12(b)(6) was proper.

We have considered all of plaintiff-appellant's remaining arguments and find them to be without merit.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

By: LUCILLE CARR

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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99 Civ. 10921 (BSJ)

PETER SUDARSKY and NOMINEE TRADING CORPORATION, d/b/a 225-227 East 52nd Street Associates,

Plaintiff,

—v.—

THE CITY OF NEW YORK, THE NEW YORK PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSPORTATION AUTHORITY, and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

Memorandum Opinion and Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Before the Court is defendants' motion pursuant to Rules 12(b)(1) and 12(b)(6) to dismiss plaintiff's complaint. For the reasons stated below, the motion is *granted*.

By this action, plaintiff *pro se* Peter Sudarsky seeks to recover damages in connection with a failed plan to develop a parcel of real estate he purchased on Man-

hattan's East Side. In particular, he alleges that defendants impeded his plans by requesting an easement for transit purposes, thus delaying the issuance of a building permit, and that, during the course of the delay, defendant City of New York (the "City") downzoned the area in which plaintiff's parcel was located, rendering his proposed structure too large to be built. Plaintiff claims that defendants' actions amounted to a taking of his property without just compensation, in violation of his rights under the Fifth and Fourteenth Amendments. He has named as defendants the City, the New York City Planning Commission ("CPC"), and the New York City Department of City Planning ("DCP") (referred to collectively herein as the "City"), as well as the New York City Transit Authority ("MTA") (referred to collectively herein as "Transit Defendants").

"Traditionally, the doctrine of *res judicata*, or claim preclusion, provides that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.' " *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Plaintiff's claims alleging a violation of his substantive and procedural due process rights, as well as his equal protection rights, were dismissed by Judge Ward in a scholarly and very detailed opinion in 1991. *See Sudarsky v. City of New York et al.*, 779 F. Supp. 287 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 506 U.S. 1064, *reh'g denied*, 507 U.S. 980 (1993).

Plaintiff now seizes upon Judge Ward's determination that his regulatory takings claim was not ripe, *see id.* at 301 ("Plaintiffs did not make use of the state court system in order to obtain compensation for their alleged taking, and thus their takings claim is unripe for this rea-

son as well."), to support his theory that this Court left open the possibility that he could return to this Court and relitigate this particular issue, if he was unsuccessful, in state court.

Preliminarily, it should be noted that plaintiff's allegations in the Complaint that there was something unlawful about defendants' insistence that an easement be given as a condition to the development of his parcel, (*See* Compl. pp. 7 & 9.), were explicitly addressed and rejected by Judge Ward. *See Sudarsky*, 779 F. Supp. at 298-301. Judge Ward found that the defendants had established the reasonableness of requiring an easement for subway access in order to offset the increase in pedestrian traffic that might be associated with plaintiff's development. *See id.*

As to the regulatory takings claim—the aspect of plaintiff's takings claim that was held to be unripe—plaintiff misperceived this Court's ruling. As this Court has already ruled, in order to maintain a claim for a regulatory taking of property, a plaintiff must establish that he was denied economically viable use of his property by virtue of the regulation at issue; and in order to establish that he was so deprived, a plaintiff must first obtain "a final authoritative determination of the type and intensity of development legally permitted on the subject property." *See id.* at 300.

It is here that plaintiff ignores the crucial holding of this Court in its 1991 decision that Sudarsky "was required to obtain a conclusive determination as to what type of development would be allowed on [his] property . . . . Plaintiffs made no such effort, and may not now pursue a regulatory takings claim in federal court." *Id.* at 300-01.

This holding precludes plaintiff's new Complaint. As this Court noted in 1991, plaintiff opted to sell off all of

the property in question within a year after the City downzoned the area. Indeed, he sold the property for $12 million, *see id.* at 293, approximately the same price at which he purchased it, which at the very least, establishes that the property was at least no less economically viable than when he bought it. More importantly, however, plaintiff sold the property rather than obtain from the appropriate agencies a determination as to its maximum economic use.

Subsequent to the dismissal of his federal lawsuit, plaintiff brought suit in state court on claims arising under the same facts and circumstances as those presented in federal court. The state courts dismissed plaintiff's claims as well.

It is well settled that, pursuant to the Constitution's Full Faith and Credit Clause, "a federal court must give to a state court judgement the same preclusive effect as would be given that judgement under the law of the State in which the judgement was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also Burgos v. Hopkins*, 14 F.3d at 789.

That plaintiff presented his regulatory takings claim in state court is manifest both in his state court pleadings and in his various briefs and memoranda presented throughout the history of the state court proceedings. For example, after laying out factual allegations that closely track the allegations in this Complaint, plaintiff claimed—as he does now—that the transit easement was used to deprive him of his right to develop his property according to the plans he submitted, and that defendants' actions in this regard constituted a *de facto* taking in violation of his constitutional rights. (*See* Plaintiff's February 17, 1993 Amended Complaint at ¶¶ 73, 84.) While plaintiff limited his pleading to claims arising under the New York State Constitution, he nonetheless frequently

raised arguments in state court predicated upon federal law

In granting defendant's summary judgement motion, New York state courts rejected plaintiff's constitutional claims. Indeed, both the Appellate Division, First Department, as well as the Court of Appeals, affirmatively acknowledged that plaintiff had presented constitutional claims and expressly rejected them.

The Appellate Division, First Department held that, "for the reasons stated by the Federal court in dismissing plaintiff's prior federal action, the challenged governmental action does not fall below a floor of constitutional protection for property owners." *Sudarsky v. City of New York*, 247 A.D.2d 206 (1st Dept.) (quotation marks and citations omitted), *app. dismissed*, 92 N.Y.2d 845, *lv. to app. denied*, 92 N.Y.2d 815 (1998), *rearg. denied*, 93 N.Y.2d 849, *rearg. dismissed*, 93 N.Y.2d 1042, *cert. denied*, 120 S. Ct. 49 (1999).

Plaintiff may not avoid the application of *res judicata* by asserting that he withheld his federal claims from the state court proceeding. As set forth above, plaintiff did in fact raise his federal claims in state court.

Further, where plaintiff's federal "takings" claim is considered unripe, and the litigant seeks instead to vindicate his rights in state court, the final state court judgement precludes subsequent litigation on that claim in federal court. *See Palomar Mobilehome Park Assoc. v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3rd Cir. 1989).

Defendants' motion pursuant to Rule 12(b)(1) and 12(b)(6) for an order granting summary judgment is *granted*. The Clerk of the Court is directed to enter judgment in favor of the defendant and close the case.

SO ORDERED:

BARBARA S. JONES
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
October 20, 2000

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

00-9470
Filed March 12, 2002

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of March two thousand two.

Present:

Hon. Rosemary S. Pooler
Hon. Robert A. Katzmann
CIRCUIT JUDGES,

Hon. David N. Hurd*
DISTRICT JUDGE.

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* The Honorable David N. Hurd of the United States District Court for the Northern District of New York, sitting by designation.

PETER SUDARSKY and NOMINEE TRADING CORPORATION, d/b/a 225-227 East 52nd Street Associates,

Plaintiffs,

PETER SUDARSKY,

Plaintiff-Appellant,

—v.—

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

A petition for panel rehearing having been filed herein by Peter Sudarsky

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

By: ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

Appendix D

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

PETER SUDARSKY ET AL., APPELLANTS,

M. Berger

—v.—

THE CITY OF NEW YORK ET AL., RESPONDENTS

L. Jaeger

MOTION FOR SUMMARY JUDGMENT
AND CROSS-MOTION FOR
LEAVE TO FILE LATE NOTICE OF CLAIM

DECIDED: OCT 31, 1995 ENTERED: OCT. 31, 1995

HON: Concur–Murphy, P.J., Rubin, Kupferman and Williams, J.J.

OPINION: Order, Supreme Court, New York County (Salvador Collazo, J.), entered April 14, 1994, granting defendants' motion for summary judgment dismissing the complaint on the grounds of res judicata and collateral estoppel, and denying plaintiffs' cross-motion to file

a late notice of claim or to deem prior filings to constitute a notice of claim pursuant to General Municipal Law § 50-e, unanimously reversed, on the law, defendants' motion denied, the complaint reinstated and the matter remanded for further proceedings, without costs.

The plaintiffs assembled eight contiguous buildings on East 52nd Street and East 53rd Streets in Manhattan for the purpose of constructing a 17-story residential building on the East 52nd Street site and renovating the three buildings on East 53rd Street. They contend that by reason of various actions or inactions, the defendants held up the proposed project until the area was downzoned, thus preventing the consummation of their plan and resulting in the sale of the parcel for $10 million, less than its fair market value before downzoning.

Plaintiffs initially sued in the United States District Court for the Southern District of New York, alleging constitutional claim and the defendants were granted summary judgment on plaintiffs' regulatory taking claim, basically on the ground that the matter was not ripe for adjudication inasmuch as there had not been a final determination by the local administrative agencies with respect to the issues and plaintiffs had not made use of the State court system in order to obtain compensation for the alleged taking, and dismissed plaintiffs' pendent State claims under the abstention doctrine (Sudarsky v City of New York, 779 F Supp 287, affd 969 F 2d 1041, cert denied 506 US 1084, reh denied 507 US 980, motion to vacate denied 1992 US Dist LEXIS 16557 [SD NY, Oct. 28 1992, Ward, J.], reh denied 1993 US Dist LEXIS 53 [SD NY, Jan. 5, 1993, Ward, J.].

Under the circumstances, the Federal court's determination was not final and so could not be the ground for application of the doctrine of res judicata, although some aspects might have a collateral estoppel effect,

which question can only be determined when all of the contentions are considered in a trial of the issues.

The cross-motion by plaintiffs to file a late notice of claim or to deem prior filings to constitute a notice of claim was denied on the ground of mootness in view of the granting of summary judgment to the defendants on the ground of res judicata. Accordingly, upon remand the cross-motion should be considered anew.

Concur–Murphy, P.J., Rubin, Kupferman and Williams, J.J.

Appendix E

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT, NEW YORK

Feb. 3, 1998

PETER SUDARSKY, et al.,

Plaintiffs-Appellants,

—v.—

CITY OF NEW YORK et al.,

Defendants-Respondents.

Martin M. Berger, *for plaintiffs-appellants*.
Jane S. Earle and Ira J. Lipton, *for defendants-respondents*.

Order, Supreme Court, New York County (Norman Ryp, J.), entered February 19, 1997, which denied plaintiffs' motion for leave to file a late notice of claim and granted defendants' cross motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

We decline to give the prior decision of this Court in this action (220 A.D.2d 353, 633 N.Y.S.2d 26) law of the case effect as to anything other than "legal determina-

tions that were necessarily resolved on the merits in the prior decision" (Baldasano v. Bank of New York, 199 A.D.2d 184, 605 N.Y.S.2d 293). As such, none of the parties' arguments on this appeal are foreclosed. Although we do not agree that the action was untimely commenced, since CPLR 203(b)(5)(i) was applicable to Supreme Court actions during the so-called transitional period (L.1992, ch. 216; see, Campbell v. Command Sec., 216 A.D.2d 508, 509, 628 N.Y.S.2d 775), we find that a notice of claim is required for the causes of action plaintiffs assert, and that adequate notice had not been given. We decline to grant plaintiffs leave to file a late notice in the present circumstances where there is no adequate reason for plaintiffs' "delay in taking steps to obtain permission to give late notice" (Matter of Rios v. City of New York, 180 A.D.2d 801, 802, 580 N.Y.S.2d 438) and where plaintiffs' action is without substantive merit. For the reasons stated by the Federal court in dismissing plaintiffs' prior action (see, Sudarsky v. City of New York, 779 F.Supp. 287, affd. 969 F.2d 1041, cert. denied 506 U.S. 1084, 113 S.Ct. 1059, 122 L.Ed.2d 365, rehg. denied 507 U.S. 980, 113 S.Ct. 1437, 122 L.Ed.2d 803), the challenged governmental action does not fall below a "floor of constitutional protection for property owners" (Manocherian v. Lenox Hill Hosp., 84 N.Y.2d 385, 392, 618 N.Y.S.2d 857, 643 N.E.2d 479, cert. denied 514 U.S. 1109, 115 S.Ct. 1961, 1962, 131 L.Ed.2d 853).

MILONAS, J.P., and RUBIN, TOM and MAZZARELLI, JJ., concur.

Appendix F

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

INDEX NO. 29446/92—PART 22

PETER SUDARSKY, ET ANO

—v.—

THE CITY OF NEW YORK, ET AL

MOTION FOR SUMMARY JUDGMENT
AND CROSS-MOTION FOR
LEAVE TO FILE LATE NOTICE OF CLAIM

ENTERED APRIL 14, 1994
COUNTY CLERK'S OFFICE NEW YORK

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPSR para. 3212, seeking summary judgment is granted. Plaintiff's cross-motion for an order seeking leave to file a late notice of claim is denied.

From a reading of the papers it appears that the allegations submitted by the plaintiffs, in opposition to the

summary judgment motion in this action, are similar to those submitted by plaintiffs for this same action in federal court. In granting defendants summary judgment in the federal action, the Honorable Robert J. Ward determined that the factual allegations made by plaintiffs in opposition to defendants' motion did not raise any material issue of fact necessitating a trial and that defendants were entitled to judgment as a matter of law. *Sudarsky v. City of New York*, 779 F. Supp 287 (S.D.N.Y. 1991). Therefore, the doctrines of collateral estoppel and res judicata prevent plaintiffs from relitigating the same issues of the same case.

As a result of the decision above, plaintiffs' cross-motion for leave to file late notice of claim is preempted, making the issue, a moot point. Further, plaintiffs have already picked their forum and their case has already been decided. Thus, no notice of claim is required.

dated 3/22/94 Salvador Collazos

Appendix G

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

The Hon. NORMAN RYP — Part 99

Index no. 29446-92

Motion Sec. no. 09

CROSS-MOTION

Plaintiffs' motion to file a late notice of claim and defendants' CPCR 3211 cross-motions to dismiss are consolidated for determination.

This action originated in the United States District Court, Southern District of New York, where the Hon Robert J. Ward dismissed all federal claims on Dec. 6, 1991. This dismissal was affirmed by the United States Court of Appeals for the Second Circuit on May 8, 1992. Plaintiffs then commenced the herein action on Dec. 24, 1992. Defendants now cross-move to dismiss as time barred. Where an action is dismissed by a federal court on non-meritorious grounds (or procedural grounds-federal issues notice?) as herein, the plaintiff has six months to recommence the action in State Court (CPLR 205(a)) In this instance the action was dismissed on Dec. 6, 1991, said dismissal was affirmed by The U.S. Court of Appeals, 2nd Cir., on May 8, 1992. However, plaintiffs did not recommence this action until December 24, 1992, more than one (1) year after the original dismissal and seven (7) and one half months after the

affirmance of said dismissal. Accordingly, the Summons and Complaint is dismissed. Plaintiffs application to file a late notice of claim is denied as moot.

so ordered.

NORMAN RYP

Entered: Feb. 19, 1997